SUPREME COURT, U. S.

MAY 4 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1125~~ 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

JAMES "SLOPPY" FLOYD, WILLIAM J. "BILL" LEE, ED T. FULFORD, J. TERRELL WEBB, W. JONES LANE, DAVID L. NEWTON, ETC. and GEORGE T. SMITH, ETC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA (ATLANTA DIVISION)

BRIEF IN OPPOSITION AND MOTION TO ADVANCE

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BRIEF IN OPPOSITION

Pursuant to paragraph 3 of Rule 16 of the Rules of this Court, the appellants file this brief in opposition to the appellees' motion to affirm or dismiss.

Statement

Appellees begin with an inaccurate statement of the facts. It is not true that the Student Non-Violent Coordinating Committee (SNCC) issued a statement "urging Americans to refuse to respond to the draft" (Br. 4). The concluding paragraphs of the SNCC statement state its position:

> "We ask, where is the draft for the freedom fight in the United States?

> We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost them lives—as painfully as in Viet Nam." (Br. 18)

The quotations ascribed to Mr. Bond (Br. 4) are taken out of context. A reading of the entire interview shows that he was only expressing his pacifist views. An accurate statement of the relevant facts may be found in the opinions below (Jur. St. 18-66).

Argument

1. Appellees make an extended argument on the merits with which we disagree, as appears from the jurisdictional statement. It is premature to present such an argument or to respond to it. As Mr. Justice Harlan has said, "the appellant in a case that is not obviously devoid of substance comes to the Court as a matter of right, and disposition of such a case involves adjudication on the merits with all of its consequences." Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541 546 (1958). Whatever the Court's ultimate disposition of the case on the merits, the jurisdictional statement and the opinions below show that substantial federal constitutional questions are presented which deserve full consideration by the Court.

2. While the appellees argue that "the controversy has become moot" (Br. 13), they actually mean that they might in the future seek to moot the controversy. More specifically, they suggest that the House Rules Committee, after conducting hearings upon Mr. Bond's second election, *might* hold that he is qualified to sit in the legislature.

There are two defects in this reasoning. First, the instant suit seeks to determine Mr. Bond's right to sit pursuant to his first election, and a second election in which he ran to protect his vested rights cannot affect those rights. Second, if acceptance of Mr. Bond's credentials by the Rules Committee will be deemed relief from the initial disqualification, the controversy is not moot because by the terms of Rule 258 the acceptance is not deemed final until affirmed by the House.[1]

3. Appellees' alternative argument that the General Assembly has adjourned for the year is quite irrelevant. Mr. Bond's term does not expire until December 31, 1966. The constituents of the 136th District have a right to be represented in any special session called by the Governor and Mr. Bond has a right to sit during such session and be given committee assignments.[2] The controversy is, again, not moot because Mr. Bond has not been paid the salary to which he is entitled.[3] The recent appointment of the committee to pass again upon Mr. Bond's qualifications is proof of the viability of the controversy, as is its postponement of a hearing to May 23, 1966 over Mr. Bond's objections.

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[1] Rule 258 of the House provides in part that "[t]he action of the committee shall be considered the action of the House until it next convenes at which time it shall affirm or reverse the committee, or take such other action thereon as it sees fit."

[2] Rule 212 of Georgia House of Representatives: "No member of the House shall be appointed to or serve on less than two (2) . . . standing committees of the House. . . ."

[3] To avoid amending the complaint by adding the State Treasurer as a party defendant in the court below, the parties stipulated that in the event that Mr. Bond prevailed the State of Georgia would pay his legislative salary (R. 302). An officer who has been wrongfully excluded from his office is entitled to the salary; the salary is deemed to attach to the office for the period of wrongful exclusion, not to the performance of the duties. Fordham, *Local Government Law* 283 (1949); *Walker* v. *Hughes*, 42 Del. 447, 36 A. 2d 47 (1944).

4. The authorities cited by appellees are inapposite and shed no light upon what appellees mean by "new and additional issues" which they allege will be introduced if the committee denies Bond his seat.

In *Heitmuller* v. *Stokes*, 256 U. S. 359, a landlord's suit for possession of land was deemed mooted when he sold the property. In *Brownlow* v. *Schwartz*, 261 U. S. 216, an owner's suit for a building permit was held moot when (i) the permit was issued and (ii) the party seeking relief sold the land. In *Oil, Chemical & Atomic Worker's Union* v. *Missouri*, 361 U. S. 363, an appeal by workers who were enjoined from striking was held moot after the strike ceased and a new contract was signed. Thus, in each of these cases a decision of the Court would have been academic (*Mills* v. *Green*, 159 U. S. 651) because the plaintiff could no longer be given the relief sought. In the instant case, however, if appellant Bond is not seated by the Rule 258 Committee, he will still be entitled to his seat and his salary, the relief he presently seeks in this Court.

Appellees make fleeting reference to *Fortson* v. *Toombs*, 379 U. S. 621. *Fortson* involved an injunction based upon a finding that the Georgia General Assembly was unconstitutionally malapportioned. The injunction, *inter alia*, prohibited the 1964 Assembly from placing an amendment to the State Constitution on the ballot. The Court declined to rule upon a motion to dismiss because of supervening events until after argument. Then, upon the application of the successful party below, the Court remanded the matter to the district court to fashion new relief. In the instant case it is the parties committing the injury who seek to avoid a judicial decision.

5. It is arguable that the mootness rule would not preclude consideration of this case even if Mr. Bond were voluntarily reinstated to his position, given whatever committee assignments he would otherwise have received, and paid his salary. This Court has held that there can be

no mootness where a continuing public interest requires a determination of issues, despite the apparent cessation of the illegal conduct (*Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290) even where the likelihood of resumption of such conduct appears indeed remote, *United States* v. *W. T. Grant Co.*, 345 U. S. 629. But that issue is not before the Court since appellees are continuing to violate appellants' constitutional rights.

CONCLUSION

The appellees' motion to affirm the judgment of the District Court or dismiss the appeal should be denied.

May 2, 1966.

Respectfully submitted,

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MOTION TO ADVANCE

Pursuant to Rule 43(4) of the Rules of this Court, appellants move this Court to advance the case for argument to the first week of argument in the October Term, 1966, if the Court notes probable jurisdiction or postpones consideration of jurisdiction.

1. Advancement is required because of the importance of the constitutional rights involved, the continuing injury to appellants, and the possibility of mootness if the case is not decided early this next Term.

2. The issues of freedom of speech and of franchise, involved in this case, are of public importance. This is apparent from the opinions below, the jurisdictional statement and the appellees' motion to affirm or dismiss.

3. Mr. Bond's term of office will expire on December 31, 1966. After that date, a substantial issue of mootness will arise. A decision by the Court before December 31, 1966 is the only assurance that the important rights involved can be adjudicated. Such a timely decision is likely only if the appeal herein is heard early in the October, 1966 Term.

4. The appellants continue to be injured so long as the appellant Bond is denied the legislative office to which he was elected; as matters now stand, he cannot serve on any committee and he cannot participate in any special legislative session that might be called. His constituents remain disenfranchised.

5. It is likely that Mr. Bond will continue to be re-elected and that, as appellees' motion indicates, they will continue to deny him a seat in the legislature because of his public expressions of opinion. Hence, the resolution of the issues on the merits this coming Term will avoid repeated litigation by appellees. It may also prevent similar actions by other state legislatures and the resulting litigation in the federal courts.

6. Certain of these considerations were urged in appellants' earlier motion to advance to the week of May 2, 1966 which the Court denied on March 20, 1966. Favorable action upon the present motion will not present the calendar problem arising from the late addition of a case for argument at the end of the October, 1965 Term, and meets the appellees' argument upon the prior motion that the im-

portance of the issues requires that appellees be given full time for preparation of their briefs.

WHEREFORE, appellants respectfully pray that the Court grant this motion to advance.

Respectfully submitted,

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